

a

SUPREME LEASING SDN. BHD.

v.

LOW CHUAN HENG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

b

[CIVIL SUIT NO. 24-2918-86]

29 DECEMBER 1988

CONTRACT: *Right of surety to recover from principal debtor.**c***CIVIL PROCEDURE:** *Proceedings may be commenced in firm's name - Partners of firm liable for agreements executed - Alleged defects in statement of claim must be pleaded in statement of defence - No merit in defendants objections.**d*

This was an appeal by the defendants against the decision of the Senior Assistant Registrar who had granted conditional leave to defend this action upon their depositing RM20,232.01 into Court. The plaintiff had made an application for summary judgment. The first defendant had entered into three lease agreements with the plaintiff. The defendants executed guarantee agreements in respect of the said lease agreements. The defendants contended that the statement of claim was defective as the payments which had been made by the defendants had not been stated and the plaintiff had not stated that two of the equipment which had been repossessed had been sold. That contention was not pleaded in the statement of defence. It was also contended that the first defendant which was a firm had no capacity to enter into any agreement. The second defendant contended that he was not liable as he could not claim contribution from the first defendant as the latter was also a principal debtor.

*e***Held:**

[1] The defendants had not pleaded in the statement of defence that there were omissions in the statement of claim on the particulars of payments made and the sale of equipment which had been repossessed. There was no merit in the defendants objections.

f

[2] Legal proceedings could be commenced against a partnership firm in its name as provided by O. 77, Rules of the High Court 1980. The partners of the firms were bound by the agreements.

[3] It was provided in s. 98, Contracts Act 1950 that the surety was entitled to recover from the principal debtor whatever sum he had paid under the agreement.

*g**[Appeal dismissed with costs.]***Case referred to:**

Keow Seng & Company v. Trustees of Leong San Tong Khoo Kongs (Penang) Registered [1983] 2 MLJ 103

Legislation referred to:*h*

Contracts Act 1950, s. 98
Rules of the High Court 1980, O. 14

For the appellants/defendants - K. Kumar, (P.K. Chew with him); M/s. Allen & Gledhill

For the respondent/plaintiff - M.K. Ng; M/s. N.K. Tan & Associates

i

JUDGMENT

Siti Norma Yaacob J:

On 20 April 1988, the Senior Assistant Registrar granted the defendants conditional leave to defend this action upon their depositing RM20,232.01 into Court within 2 weeks upon the date of his order.

The present proceedings before me was an appeal against that order.

As the sole proprietor of a trading firm called Low Chuan Heng Contractor, the 1st defendant had entered into 3 lease agreements, 2 on 15 August 1983 and the third on 8 August 1983 with the plaintiff wherein certain equipment were leased to the 1st defendant with rentals for sums specified in the agreements to be paid by 36 monthly instalments. Together with the 3 lease agreements, 3 letters of guarantee and indemnity were also executed by the 1st and 2nd defendants whereby they agreed to guarantee payment of all rentals due from the 1st defendant firm and they further indemnify the plaintiff for all loss or damage suffered resulting from the failure of the 1st defendant firm to perform its obligation under the lease agreements.

The 1st defendant firm defaulted in paying the due rentals and hence the filing of the present suit against the 1st defendant as the principal debtor and guarantor and against the 2nd defendant as the other guarantor named in the 3 letters of guarantee and indemnity.

No affidavit in reply was filed by the defendants opposing the plaintiff's O. 14 application as they were content to rely on their statement of defence dated 27 April 1987. In the course of writing this judgment, I notice that the defendants have since filed an undated amended statement of defence but it is not clear by what authority the amendments were made but from the date endorsed on the praecipe, the amended statement of defence was filed on 2 November 1988, well after the hearing of the appeal before me.

The first issue taken by the defendants was the defects in the statement of claim in that it failed to disclose payments made by the defendants prior to the filing of the statement of claim and that after filing, there were sales made by the plaintiff of 2 repossessed equipments which do not appear in the statement of claim. It is the plaintiff's contention that the statement of claim should be amended.

I do not consider that the defendants can raise objection to such omissions at the hearing for the simple reason that they were not pleaded in their statement of defence. In any event, I do not consider failure to amend the statement of claim to include such omissions as fatal to the plaintiff's claim as such omissions have not been shown to have prejudiced the defendants in any way. On the contrary since one of the omitted facts relates to the sales of 2 repossessed equipments, the plaintiff have already given credit for such sales and there is therefore no purpose in incurring further costs by amending the statement of claim. Liability is only disputed by the 1st defendant firm as the ground that it had no legal entity to enter into any contractual relations and as such the 3 lease agreements are void and unenforceable. I can do no better than to quote Raja Azlan Shah LP as his Highness then was in the case of *Keow Seng & Company v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103 when His Lordship confirmed that

a partnership firm is not a legal entity in law. This characteristic is peculiar to the common law concept of an unincorporated entity and had caused difficulties in the past. Some of these difficulties mainly, those of a procedural nature have been met by rules of Court. The Rules of the High Court 1980 (O. 77) provide for the commencement of legal proceedings by and against partnership firms in the firm name which is merely a convenient method of encapsulating the individual partners who constitute the partnership firm."

a

b

c

d

e

f

g

h

i

a Likewise to take a clearer example if a dissatisfied client of Messrs. Allen & Gledhill, a firm of solicitors in Kuala Lumpur should decide to sue the firm for negligence, Messrs. Allen & Gledhill would be cited as the defendant but for all intents and purposes, it is the 5 partners or so of the firm that are being sued, although for convenience, the firm is cited as a party.

b In this case, although the 3 lease agreements had been entered into by the 1st defendant firm, it is the partners of the firm that are bound by the agreements and as such, there is no substance to the 1st defendant's submission that the agreements are void and unenforceable as they were executed by a firm.

c Liability is also disputed by the 2nd defendant on the ground that he cannot claim contribution from his co-guarantor, the 1st defendant as the latter is also the principal debtor. This again merits no consideration as under s. 98 of the Contracts Act 1950, in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principal debtor whatever sum he had rightfully paid under the guarantee. As such there is nothing to prevent the 2nd defendant seeking contribution against the 1st defendant, even though the 1st defendant is also the principal debtor.

d Since all the issues raised by the defendants have been satisfactorily replied by the affidavit evidence and that the defendants have not succeeded in showing that the Senior Assistant Registrar had been wrong to order conditional leave to defend, I had accordingly dismissed the defendants' appeal with costs.

Also found at [1989] 1 CLJ 809

e

f

g

h

i